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No. A-612

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IN THE

ALEXANDER L STEVAS,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1983

ANTHONY FRANCIS EBERT, ET UX.,

Petitioners,

v.

JUDITH P. RITCHIEY, ETC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Is the Maryland Dead Man's Statute (§9-116, Courts and Judicial Proceedings, Annotated Code of Maryland) unconstitutional?

II.

Did the Maryland Court of Special Appeals apply the Maryland Dead Man's Statute so as to deny Petitioners' due process of law by construing added parties claiming as beneficiaries of an inter vivos trust as "heirs ... as such" under the statute?

Parties to the action: Judith Ritchey, Personal Representative of the estate of Charles F. Ebert, deceased was the original Plaintiff. Petitioners, Anthony F. Ebert and his wife, Adeline were Defendants to the action. Andrew Ebert, Joseph Ebert and Barbara Mandish, brothers and sister of the Charles F. Ebert and Anthony F. Ebert were added as new Plaintiffs after the case had been tried and held sub curia.

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Code of Maryland 2,3,
4,17,20

Text

McCormick on Evidence 2nd ed. 15

Wigmore on Evidence 15

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PRIOR ORDERS AND OPINIONS

April 1, 1982: The Circuit Court for Baltimore County, Maryland (Haile, J.) entered an Opinion and Order following trial.

April 14, 1983: The Court of Special Appeals of Maryland filed a Opinion reported in 54 Md.App. 388, 458 A.2d 891.

April 20, 1983: Mandate was issued by Court of Special Appeals of Maryland.

August 9, 1983: The Court of Appeals of Maryland denied Petition for Writ of Certiorari.

October 31, 1983: The Court of Appeals of Maryland denied Motion for Reconsideration.

February 1, 1984: The Supreme Court of the United States (Burger, C.J.) granted extension of time for filing of Petition for Writ of Certiorari until March 29, 1984.

JURISDICTIONAL STATEMENT

Petitioners seek review of the decision of the Court of Special Appeals of Maryland filed April 14,

1983, No. 1073, September Term, 1982, Reported in
54 Md.App. 388 and 458 A.2d 891.

By its Order dated February 1, 1984, the Supreme Court of the United States (Burger, C.J.) extended time for filing of this Petition until March 29, 1984, (No. A-612).

Petitioners contend that certiorari to this Court is proper under 28 U.S.C. §1257(3) because of the validity of §9-116, Court and Judicial Proceedings, Annotated Code of Maryland, more commonly known as the Maryland Dead Man's Statute is repugnant to the Constitution of the United States as amended.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS AT ISSUE**

U.S. Constitution Amendment XIV, §1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Annotated Code of Maryland, Courts and Judicial
Proceedings §9-116. Dead Man's Statute

"A party to a proceeding by or against a personal representative, heir, devisee, distributee, or legatee as such, in which a judgment or decree may be rendered for or against them, or by or against an incompetent person, may not testify concerning any transaction with or statement made by the dead or incompetent person, personally or through an agent since dead, unless called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement."

At trial, the Dead Man's Statute became involved when Petitioner was questioned by his counsel on direct examination:

"Q. Mr. Ebert, did you ever have a conversation with your brother Charles in which he told you what he wanted you to do with this money?

MR. BARNES: Objection.

THE COURT: Under what ground?

MR. BARNES: Well, first of all its leading. Second of all, under the dead man's rule, this —

THE COURT: Does that dead man's rule apply to such a question, Mr. Pachino?

MR. PACHINO: I would think, if Your Honor please, it wouldn't apply to this question. I think it might apply to the

next question if there were, if Your Honor follows me.

(T. 262) THE COURT: I don't think whether he talks or not would be a violation of the statute. I sustain it.

MR. BARNES: Any statement or?

THE COURT: Even the fact that he didn't talk to him would be a violation. So I think it's probably correct. Therefore, I sustain the objection.

MR. PACHINO: Okay, sir. I have no further questions."

(It should be noted that the brothers and sister were not party Plaintiffs at trial, they were added parties after the case was held sub curia.)

In Petitioners' brief filed with the Maryland Court of Special Appeals, Petitioners argued that the addition of new parties after the case had been tried resulted in prejudice to the Petitioners.

"Additionally, the Appellants were clearly prejudiced by the addition of the new class of parties added after trial.

"In the posture in which the case was tried there was but one Plaintiff, the Personal Representative. In such situation, the Appellants were barred from testifying as to any conversations or transactions with the decedent per the Dead Man's Statute (Annotated Code of Maryland, Courts and Judicial Proceedings §9-116). Whereas had the brothers and

sister been party Plaintiffs at trial, Appellants would have been able to testify to conversations and transactions with the decedent as it touched and concerned the alleged trust in favor of the brothers and sister of the decedent.

"Appellants strenuously argued that it was prejudicial error to allow the filing of a Third Amended Bill of Complaint after the trial and after the case was held sub curia, where the new Bill added an entirely new class of parties to the action and the original Plaintiff was not a proper party to the action to enforce an alleged trust in favor of the brothers and sister of decedent."

In Petition for Writ of Certiorari filed in the Court of Appeals of Maryland, Petitioners argued that they had been denied due process of law:

"Notwithstanding the fact that the Third Amended Bill of Complaint labels the newly added Plaintiffs as "heirs", they were not heirs as such. They may also have been heirs, but the claim filed by them was not as 'heirs as such' but as beneficiaries of a trust. As heirs they would take through the estate; as beneficiaries of a trust they would take directly from Petitioners.

"Under such circumstances, Petitioners were denied due process of law, denied a right to testify in their own behalf.²⁷ ... ²⁷ It is also possible that this Court might seize this opportunity to declare

that the Dead Man's Statute is unconstitutional. Petitioners can think of no other law, save prejury conviction, which prevents a litigant from his constitutional right to testify. Certainly existing case law proscribes that all testimony as to what a decedent said or did should be received with great caution. The weight to be accorded such testimony can be guarded by instructions. But to deny the testimony from a person because they are a party while non-parties can testify should raise constitutionally concerned eyebrows. (end of note).

"The only party at trial was the personal representative who stipulated that she was only seeking assets for the benefit of the estate, hence she was acting as a personal representative 'as such'. The addition of new Plaintiffs claiming not as 'heirs ... as such' but as beneficiaries of a trust after the case was held sub curia was prejudicial to the Petitioners since had the new Plaintiffs been plaintiffs at trial, Petitioners' testimony as to conversations and transactions with the decedent would have been admissible as against the new Plaintiffs. Their addition after the case was tried was clearly prejudicial and unconstitutional."

STATEMENT OF THE CASE

Judith Ritchey as Personal Representative of the estate of Charles Ebert, deceased, brought an action in the Circuit Court for Baltimore County,

Maryland to recover the proceeds of several bank accounts from Petitioners for the estate.

After a trial on the merits, the case was held sub curia. Thereafter, the Trial Court over Petitioners' objection, allowed the brothers and sister of decedent, claiming as beneficiaries of an inter vivos trust, to be added as Plaintiffs.

The Trial Court found for Petitioners on some of the accounts and against Petitioners as to the other accounts.

An Appeal and Cross Appeal to the Court of Special Appeals of Maryland resulted in judgment that Petitioners had to divide up all the accounts with the new parties.

A Petition for Writ of Certiorari filed in the Court of Appeals of Maryland was denied, as was a Motion for Reconsideration.

The Supreme Court of the United States granted Petitioners an extension of time to file a Petition for Writ of Certiorari.

STATEMENT OF FACTS

Several days after the death of his wife, Charles F. Ebert (the decedent), who had no children, changed over all of his bank accounts by making his brother, Anthony Ebert (the Petitioner), the joint owner with decedent, of the accounts.

When, thereafter, decedent died, Petitioner obtained the various passbooks, certificates of deposit and checking account, paid the inheritance tax and transferred the accounts to Petitioner's name and his wife's name.

Judith Ritchey, an attorney, was appointed Personal Representative of decedent's Estate by the Orphans' Court for Baltimore County. She brought suit against Petitioner and his wife (Petitioners). A Stipulation filed at trial stated, inter alia, that suit was brought by the Personal Representative to recover assets for the estate.

At trial, the Personal Representative produced three (3) witnesses who stated that decedent told them, individually, several months after the accounts

had been changed by decedent that he had placed the money in Petitioner's name so that Petitioner could, upon decedent's death, pay his last bills and divide up the monies remaining among Petitioner and his two (2) brothers and sister.

Personal Representative invoked the Maryland Dead Man's Statute and Petitioners were not allowed to testify as to any conversations or transactions with decedent. There was placed in evidence, however, a paper writing in decedent's own handwriting, which he labeled as his "Will". The "Will" was signed by decedent, witnessed by another and dated by him within thirty (30) days of the date the accounts were placed in decedent's and Petitioner's names. That "Will" read in part:

"All my earthly possession, money, furniture, clothes, etc., to be (bestow) bequeath to my Brother Anthony F. Ebert. He is to do what he desires with it. Keep it all or give to my relatives or some needy charity organization. Brother Anthony can decide which one."

At closing argument, Petitioners argued that Personal Representative's evidence showed that an

alleged inter vivos trust had been created and the Estate was not entitled to recover. Further, that the alleged beneficiaries were not parties to the case.

Case was then held sub curia.

Thereafter, over Petitioners' objection, the Trial Court allowed a Third Amended Bill of Complaint to be filed adding decedent's brothers and sister (new parties) as party Plaintiffs. The Trial Court then found the Petitioners were the owners of two (2) of the accounts but that the remainder of the accounts would have to be divided among Petitioner and the new parties.

An Appeal and Cross Appeal to the Maryland Court of Special Appeals were entered. Petitioners argued that they had been prejudiced by the addition of the new parties after the case was held sub curia by the Trial Court. Petitioners argued that had the new parties been parties at trial, then Petitioners could have offered evidence of their conversations and transactions with decedent since the new parties

would not have been entitled to the protection of the Maryland Dead Man's Statute.

The Court of Special Appeals disagreed saying that Petitioners had misread the Statute, and the testimony would have been inadmissible even if the new parties had been parties at trial. In its reported Opinion the Court held that Petitioners had to divide up all the accounts with the new parties.

Petition for Writ of Certiorari filed in the Court of Appeals of Maryland was denied as was a Motion for Reconsideration filed in that Court.

ARGUMENT

I.

THE MARYLAND DEAD MAN'S STATUTE IS UNCONSTITUTIONAL

At common law parties and all other persons having a direct pecuniary interest in the outcome of any litigation were not competent to testify. That rule continued in force in England until the middle of the nineteenth (19th) century and in this country a few decades longer. In England, the reform was

sweeping and no semblance of such disqualification remains.

In the United States, a compromise resulted in the enactment of the Dead Man's Rule, denying a party the right to testify as to conversations and transactions had with a decedent in an action involving the estate of a decedent.

Thus, in a suit for room and board furnished by a plaintiff to a decedent, the plaintiff was not permitted to testify as to services rendered. Giering v. Sauer, 120 Md. 295, 87 A. 774 (1913).

Similarly, a party who paid his note to a decedent and had no receipt could not testify as to payment in an action by personal representative on the note.

In the case at bar, the personal representative invoked the statute and petitioners were unable to testify as to any conversation or transactions with decedent relative to certain bank accounts which were the subject of the litigation.

The Court of Special Appeals was aware of the impact of the Statute on Petitioners, as its Opinion stated:

"The testimony of Anthony ... was severely restricted by virtue of the 'Dead Man's Statute' ..."

The great majority of states have recognized the severe hardship and injustice caused by the statute. In an effort to remedy the situation, thirty-one (31) states have abolished, repealed or amended the statute.¹ Some have amended the statute to allow the testimony but require corroboration in order to grant a judgment on such evidence. Some states allow the evidence to come in upon a finding by the trial judge that it is necessary to prevent injustice.

While the majority of states have recognized the unfairness of the dead man's rule and amended or repealed it, the Maryland Dead Man's Statute,

1Those states which have abolished, repealed or amended the dead man's rule are: AK, AR, CA, CO, CT, DE, D.C., FL, GA, HI, KS, LA, ME, MA, MI, MT, NE, NV, NH, NJ, NM, OH, OK, OR, PA, RI, SD, VT, VA, WY.

enacted in its present form in 1904, has remained unchanged to the present.

The refusal to receive evidence otherwise relevant and material often presents a litigant with an overwhelming burden. And, when that litigant is the only witness to a transaction or conversation with the decedent an insurmountable burden is placed on the litigant.

Traditionally, two arguments are given in favor or preserving the dead man's rule.

1. To equalize the position of the parties by imposing silence on the survivor, since death has silenced the decedent, Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955), Sootheage v. King, 227 Md. 142, 176 A.2d 221 (1961);

2. To eliminate as far as possible, frauds upon the estates of deceased persons. Snyder v. Crabbs, 263 Md. 28, 282 A.2d 6 (1971).

Professor Wigmore responds to the latter justification saying that it "sufficiently typifies the

superficial reasoning on which the rule rests. Are not the estates of the living endangered daily by the present rule which bars proof of so many honest claims? ..."

"... There never was and never will be an exclusion on the scope of interest which can be defended as either logical or practically sound"

Wigmore on Evidence §578 p. 821.

McCormick says that the statute "has now become so ingrained a part of judicial and professional habits of thinking that it is hard to dislodge by argument" McCormick on Evidence 2nd ed. 143.

The Maryland Court of Appeals has acknowledged that the dead man's rule has been "much criticized by eminent legal authorities" Shaneybrook v. Blizzard, 209 Md. 304, 121 A.2d 218 (1956). It has stated, in case after case, that the statute must be narrowly construed Schifanelli v. Wallace, 271 Md. 177, 315 A.2d 513 (1974). See also Robinson v. Lewis, 20 Md.App. 710, 317 A.2d 854, cert. granted 272 Md. 744 (1974) ("most narrowly construed"). The

Maryland high court is by no means enamored with the statute; however, when called upon to strike down the statute it has meekly hidden behind the shields of stare decisis and constitutional limitations of its powers. O'Connor v. Estevez, 182 Md. 541, 35 A.2d 148 (1943).

Can these claimed excuses justify the Maryland Courts' action in upholding the Statute?

The short answer is that it is the duty of the Court to strike down any law that deprives persons of property without due process of law. We perceive the right to testify in a court of law as one of our most basic and fundamental rights.

The Maryland Dead Man's Statute denies due process by excluding otherwise relevant and material evidence. By refusing to receive such evidence the scales of justice are tipped overwhelmingly, and at times insurmountably, in favor of decedents' estates.

The safeguards placed upon the receipt of testimony relative to transactions and conversations of a decedent by a party in the majority of states

result in a fair and reasonable treatment of the problem, but the Maryland Statute and others like it are grossly unfair, unreasonable, unnecessary without any rational basis. The Maryland Dead Man's Statute is an archaic vestige of the common law.

Section 9-116 Courts and Judicial Proceedings, Annotated Code of Maryland is unconstitutional.

II.

THE MARYLAND COURT OF SPECIAL APPEALS DENIED PETITIONERS DUE PROCESS OF LAW BY CONSTRUING ALLEGED BENEFICIARIES OF AN INTER VIVOS TRUST AS "HEIRS ... AS SUCH" UNDER THE MARYLAND DEAD MAN'S STATUTE.

At the time of the trial there was but one Plaintiff, the Personal Representative who had stipulated that she had instituted suit to recover assets for the Estate.

When Petitioners attempted to testify as to conversations and transactions which they had with decedent, the Personal Representative's objection based on the Dead Man's Statute was sustained.

Since this was an action by a Personal Representative seeking assets for an Estate and the testimony was being offered by a party, the Petitioner, as to conversations or transactions had with the decedent, such testimony fell within the provisions of the Maryland Dead Man's Statute and the Trial Court sustained the objection.

However, the evidence produced by the Personal Representative showed that decedent had put the monies in Petitioner's (Anthony Ebert's) name so that he could pay decedent's bills and funeral expenses and divide the sum remaining in his hands among himself and his brothers and sister.

Petitioner argued that the evidence produced by the only Plaintiff, the Personal Representative showed that the Personal Representative was not entitled to any of the assets.

After the case was held sub curia by the trial judge, a Third Amended Bill of Complaint was filed which named the brothers and sister of decedent as

Plaintiffs. Petitioners objected, but the trial judge allowed the new bill to be filed.

In the Court of Special Appeals, Petitioners argued that they had been severally prejudiced. Petitioners argued that had that new parties been parties at the trial, then Petitioners could have testified as to their conversations with the decedent as it touched and concerned the allegations of an inter vivos trust.

In essence, Petitioners argued the Dead Man's Statute would not apply to an inter vivos trust since that was not an action which would increase or diminish the assets of the Estate of Charles F. Ebert.

"...the testimony meant to be excluded by the operation of the statute is that testimony of a party to a cause which would tend to increase or diminish the estate of a decedent by establishing or defeating a cause of action by or against the estate."

State v. Brainin, 224 Md. 156, 167 A.2d 117 (1961) citing Riley v. Lukens Dredging, 4 F.Supp. 144, (D.C.Md. 1933)

The Court of Special Appeals took the view

that Petitioners had misread the statute and that if the newly added Plaintiffs were parties to the action at the trial, the Dead Man's Statute would nonetheless have precluded the Petitioners from testifying as to their conversations and transactions with the decedent.

Such is not the law.

The Court of Special Appeals found that the new parties were "heirs" and that just as Petitioners' testimony as to conversations and transactions with the decedent were barred because the only Plaintiff was the Personal Representative, no greater right would have accrued to Petitioners because the Court said the added Plaintiffs were "heirs" who are also covered by the Dead Man's Statute.

The fallacy of that argument is apparent from the words of the statute itself.

Such testimony would be barred by a "party to a proceeding by or against a personal representative, heir, devisee, distributee or legatee as such ..." §9-116 Courts and Judicial Proceedings, Annotated Code of Maryland.

Notwithstanding the fact that the Third Amended Bill of Complaint labels the new Plaintiffs as "heirs", they were not "heirs ... as such." They may also have been heirs, but the claim filed by them was not as "heirs as such" but as beneficiaries of a trust. As heirs they would take through the estate; as beneficiaries of a trust they would take directly from Petitioners.

Petitioners were denied due process of law when the Court of Special Appeals of Maryland wrongfully applied the Maryland Dead Man's Statute and found that Petitioners' testimony as to conversations and transactions with decedent would have been inadmissible were the new parties, parties at the trial.

Respectfully submitted,

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JUDITH P. RITCHIEY, * THE CIRCUIT COURT
PERSONAL REPRESENTA- * FOR
TIVE, etc., et al *

Plaintiffs * BALTIMORE COUNTY

vs. * CASE NO. 99643

ANTHONY FRANCIS * Equity Docket 133
EBERT and *
ADELINE EBERT * Folio 106

Defendants *

* * *** * *

OPINION AND ORDER OF COURT

The decedent was survived by three brothers and one sister. He died intestate. His younger brother, Anthony, took his clothing and furniture after his death, and found among his personal possessions envelopes containing his bankbooks, his certificates of deposit, his railroad retirement papers, and his insurance policies.

All of the bankbooks and certificates had Anthony's name on them as co-owner. The railroad retirement papers had all four survivors as beneficiaries. There was no evidence as to how Anthony collected the insurance funds. However, he divided

the \$6,000.00 insurance monies between himself and his two brothers and sister, share and share alike. He did not divide the monies on deposit. He paid 10% inheritance tax on one-half of the monies on deposit. In this action, the decedent's estate seeks to recover from Anthony the monies on deposit.

OPINION

The pleadings speak for themselves. It would serve no useful purpose to state the substance of the pleadings. The exhibits which were received in evidence are voluminous and they speak for themselves, and need not be copies into this opinion.

Oral testimony was heard from Mr. Wise, an official of the Union Trust Company; John Robert Mandish, surviving brother-in-law of decedent, who is the husband of the decedent's surviving sister; M. Anglee Mandish, who is married to the surviving nephew of the decedent, named John Rudolph Mandish, son of the decedent's surviving sister; John Rudolph Mandish, surviving nephew; and Anthony F. Ebert, surviving younger brother of the decedent.

Plaintiffs proved through witnesses that it was the intention of the decedent before his death that the monies in the financial institutions should be collected by his younger brother and divided equally between himself and his two brothers and sister. The Defendants objected to the evidence and moved to strike the evidence on the ground that it was hearsay. The Court reserved decision and received briefs on the issue and consulted the cases cited. It is determined that the objection is overruled and the motion to strike is denied.

The Plaintiffs moved to strike Exhibits 2 and 6 which were introduced by the Defendants, the decedent's handwritten document and his list of assets which were found among his papers after his death. After hearing arguments and reading the briefs and consulting the precedents, it is determined that the motion to strike these two exhibits is denied.

It is concluded that the two trust accounts, which are the checking account at Union Trust Company and the savings account at Savings Bank

of Baltimore, are not recoverable in this action, and that the monies deposited in all of the other accounts are recoverable, plus accumulated interest. The intention of the decedent was that all of the monies in the financial institutions were to be collected after his death and divided in kind between his surviving brothers and sister. That intention does not prevail as to the monies in the checking account at Union Trust and the savings account at the Savings Bank of Baltimore. The only way that the trust in those accounts could be revoked is by withdrawing the funds prior to the decedent's death. Milholland v. Whalen, 89 Md. 212.

The Court finds that there was not a completed gift from the decedent to Anthony of the funds on deposit, other than those deposited in the two trust accounts above mentioned.

The Defendants contend that the oral statements of the decedent were uttered after the monies were placed in joint accounts and should be stricken as evidence for that reason. However, that

contention is overruled as to the joint tenancy accounts which were never completely given to the younger brother prior to decedent's death. Hence, the oral statements of intention are admissible, they having been made prior to his parting with control of the monies by his death.

The Defendants also contend that the paper writings, Defendants' Exhibits 2 and 6, should prevail over the later oral statements insofar as they conflict and that accordingly, all of the monies in the financial institutions should be given to the Defendants. That contention is rejected because the documents do not constitute a Last Will and Testament. The intentions expressed in writing were changed at a later date by the intentions expressed orally to reliable witnesses.

O R D E R

WHEREUPON it is by the Circuit Court for Baltimore County, in Equity, on this 1st day of April, 1982,

ADJUDGED, ORDERED and DECREED that the Defendants, Anthony F. Ebert and Adeline Ebert, shall account to the Plaintiffs for the funds on deposit with Union Trust Company, Savings Bank of Baltimore and Security Savings and Loan Association, excepting [sic] the joint trust checking account with Union Trust and the joint trust savings account with Savings Bank of Baltimore; and further

ORDERED that the matter shall be referred to one of the standing auditors of this Court for accounting; and further

ORDERED that the Auditor shall receive evidence from the Defendants of any claims they may wish to assert against the estate by way of recoupment or setoff; and further

ORDERED that the Auditor shall make his recommendations to the Court after completing his accounting; and further

ORDERED that the costs of this case, including the auditor's fee, shall be paid one-half by the

individual Plaintiffs and the other half by the
Defendants.

WALTER R. HAILE, JUDGE

Copies sent to:

Clay M. Barnes, Esquire
Joel H. Pachino, Esquire
Eugene Creed, Esquire

Opinion of the Court.

[54 Md. App.

Clay M. Barnes, with whom were *John E. Raine, III* and *Barnes & Raine, P.A.* on the brief, for appellees.

GILBERT, C. J., delivered the opinion of the Court.

When Charles Ebert, a childless widower, died in 1978, he left five bank accounts, totaling approximately \$86,794.16, and four siblings. The interest of the siblings in and to the principal of the bank accounts is the subject of this appeal.

The Facts

Prior to the death of Charles's wife Louise in 1976, he and she jointly owned five bank accounts. After her death Charles substituted on the accounts the name of his youngest brother, Anthony Ebert (Anthony), for that of Louise. Upon the death of Charles, Anthony took possession of the indicia of the accounts which had been physically kept by Charles. Anthony paid from the accounts Charles's last expenses. He then withdrew the balance of the monies from the accounts and deposited them in other accounts bearing his name and that of his wife, Adeline.

Despite demand from Joseph Ebert, Andrew Ebert, and Barbara Mandish, Charles's other surviving brothers and sister, as well as from Judith P. Ritchey, the personal representative of Charles's estate, Anthony and Adeline steadfastly refused to surrender all or any part of the funds. Anthony insisted that the monies had been given to him individually. Anthony did, however, divide by four the approximately \$8,000 of proceeds from two insurance policies in which he was listed as sole beneficiary. He sent each of his brothers and sister a sum of slightly more than \$2,000.

Eventually, a bill of complaint was instituted in the Circuit Court for Baltimore County by Ms. Ritchey, the personal representative. Among the objectives of the suit were:

- a) the impression of a constructive trust upon the monies that Anthony and Adeline had received from Charles's accounts;
- b) an accounting to the personal representative of the monies;
- c) payment to the personal representative of all the monies received by Anthony and Adeline from Charles's accounts, together with interest and dividends earned thereon in the interim.

Following much preliminary sparring in the form of pleadings, discovery, and the like, the case went to trial on a second amended bill of complaint.

There was testimony from three witnesses as to five conversations with the decedent that occurred during the period May, 1977, through October, 1977. In the course of those conversations, Charles is said to have told the witnesses that he "put . . . Tony [Anthony] in charge of things" so that Anthony "could pay all the bills and straighten out all the problems that arise with that. And . . . they could take and divide up . . . [the] estate . . ." One witness testified that Charles said, "I don't want anything to go through Orphans' Court, so it will be gobbled up by Orphans' Court. I want everything divided up."

The testimony of Anthony, which was severely restricted by virtue of the "Dead Man's Statute," Md. Cts. & Jud. Proc. Code Ann. § 9-116, dealt with the relationship existent between Charles and Anthony accounting from their childhood. Anthony told the chancellor that he "of his own accord" split the insurance proceeds with his sister and brothers because "he felt sorry for them."

It is fair to state that the witnesses generally described the relationship between Charles and his siblings as "close." Anthony candidly acknowledges that fact.

The personal representative, Judith Ritchey, after the testimony was concluded, was allowed, over objection, to file a third amended bill of complaint. As a result of the amendment, Joseph, Andrew and Barbara were joined as parties plaintiff.

The chancellor found that, "it was the intention of the decedent that the monies in the financial institutions should be collected by his younger brother [Anthony] and divided equally between himself and his two brothers and sister" The judge went on to rule that two bank accounts, one in the Savings Bank of Baltimore and the other a checking account in the Union Trust Company were "trust accounts" and thus the property of Anthony and Adeline. That ruling was grounded on *Milholland v. Whalen*, 89 Md. 212, 43 A. 43 (1899).

The remaining three accounts, the chancellor said, belonged to the appellees. He referred the matter to an auditor.¹ Anthony and his wife have appealed. Joseph, Andrew, Barbara and Ms. Ritchey, as personal representative, have cross-appealed.

The Issues

The parties in their respective appeals posit a total of six questions. Anthony and Adeline ask:

"I. Was it error to allow a third bill of complaint to be filed adding an entirely new class of plaintiffs after the case had been held *sub curia*.

II. Did the chancellor err in receiving inadmissible evidence to prove a trust.

III. Was the evidence sufficient to prove a trust by clear and convincing evidence.

IV. Was the Union Trust account a trust account and/or did it pass to appellant by operation of law.

V. Did the agreement signed with Security Savings and Loan create a joint tenancy in the

1. Md. Cts. & Jud. Proc. Code Ann. § 12-303 provides that a party may appeal from an order "[d]etermining a question of right between the parties and directing an account to be stated on the principle of such determination."

The trial judge's order determines the rights of the parties to the disputed bank accounts while also requiring an accounting. This appeal is within our jurisdiction.

funds and/or prevent the personal representative from claiming same for the estate and/or with all other evidence obviously show that a trust was intended though words 'in trust' were not used."

Joseph, Andrew, Barbara and the personal representative raise one issue:

VI. "In view of the court's findings as to the intentions of the decedent, did the Chancellor err as a matter of law in failing to impose a constructive trust on the proceeds of the Union Trust checking account and the Savings Bank of Baltimore savings account?"

The appellees have moved to dismiss the appellants' appeal pursuant to Md. Rule 1036 on the ground that appellants' brief violates Md. Rule 1031 as to "Style and Contents of Brief." Although we agree that the brief does not conform strictly to the Rules, we nevertheless exercise our discretion and deny the motion because we do not view the violations as substantial.

In light of the overlapping nature of the issues raised, we have opted to consider several of them together, and we have divided our opinion into four sections. We shall, in discussing each section, add such additional facts as may be necessary.

The Third Amended Bill of Complaint

Appellants argue that the chancellor erred in allowing the filing of a third amended bill of complaint at a point in time following the trial and while the matter was being held *sub curia*.

The original plaintiff, as we have seen, was Judith P. Ritchey, in her capacity as court appointed personal representative of decedent's estate. See Md. Rule 203 b. (1). Apparently, because of the evidence that unfolded at trial, Joseph, Andrew and Barbara sought to become parties plaintiff. By a third amended bill of complaint, their names

were added as complainants over appellants' strong objection.

Anthony contends that the decedent's personal representative was not a proper party to bring an action to enforce a trust for the benefit of the surviving brothers and sister who may have a claim as beneficiaries of a trust. Anthony cites as authority for his position *Illian v. Northwestern National Insurance Co.*, 215 Md. 507, 138 A.2d 884 (1958). That case, however, is factually inapposite. There the Court of Appeals dealt with an insurance policy purchased by a partnership. The Court said that a personal representative of a deceased partner could not maintain or join an action to enforce the insurance contract because the deceased partner's interest in a partnership contract devolves on the surviving partners, not the personal representative. 215 Md. at 513. See, 1 Poe, *Pleadings and Practice*, (Sixth ed.), § 352; *Restatement, Contracts*, § 132; 4 Corbin, *Contracts*, § 939 at 783-784.

What the appellants in this case overlook is that the personal representative asserted a claim to the funds on behalf of the estate, in addition to her request for a constructive trust. Certainly, the personal representative had not only a right, but a duty, to pursue what she believed to be assets of the estate she was charged with administering.

Md. Rule 320 b. permits an amendment to be made so as to bring into the case any heir who might have been omitted, and the court, in a non-jury case, may allow amendment "at any time before a final judgment or decree is entered." Md. Rule 320 c. 1.

Maryland has repeatedly held that amendments are to be permitted freely in order to promote the ends of justice. *Staub v. Staub*, 31 Md. App. 478, 356 A.2d 609 (1976). The granting or denial of an amendment is within the discretion of the trial court. *Sanford v. Sanford*, 15 Md. App. 390, 290 A.2d 812 (1972). No appeal will lie from the trial court's ruling in the absence of a clear showing of an abuse of discretion. *Wright v. Trotta*, 34 Md. App. 309, 367 A.2d 557 (1976). "Additional parties plaintiff may be added . . . subject only to

the limitation contained in Rule 320 b . . . [1.] that 'some one of the original plaintiffs and some one of the original defendants must remain as parties to the action.' *Crowe v. Houseworth*, 272 Md. 481, 485, 325 A.2d 592 (1974).

Appellants argue that they were unfairly prejudiced by the amendment because, had the heirs been party plaintiffs at the trial, appellants would not have been prevented by the Dead Man's Statute, Courts Art. §9-116, from testifying as to their conversations with the decedent.

We think appellants misread the statute. Courts Art. §9-116 provides, in pertinent part:

"A party to a proceeding by or against a personal representative, heir, devisee, distributee, or legatee as such, in which a judgment or decree may be rendered for or against them . . . may not testify concerning any transaction with or statement made by the dead or incompetent person, . . . unless called to testify by the opposite party . . ." (Emphasis added.)

Quite obviously, the statute embraces actions "by or against" heirs, devisees, distributees or legatees. Appellants fall clearly within the class of persons against whom the Dead Man's Statute is directed. Had Joseph, Andrew and Barbara, as heirs, brought the action in the first instance against Anthony and Adeline, as heirs, the statute would have applied with the same force and effect as was applied in the trial of this cause.

Fairness to appellants compels us to note that in *Snyder v. Crabbs*, 263 Md. 28, 30, 282 A.2d 6 (1971), the Court said that the Dead Man's Statute "is applied only to proceedings brought by or against an executor or administrator as such. Beyond this narrow area it has no application." Taken out of context the quoted statement would seem to rewrite the statute and limit its application to contests by or against personal representatives only. The statement by the Court is overly restrictive, but a careful reading of the opinion and the cases cited as authority leads to the conclusion that the

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Court was actually holding in the case that the rule prohibits testimony by parties, not by third parties. Apparently in typing or printing the opinion, some of the wording of the statute was inadvertently omitted.

The Dead Man's Statute applied in the instant case to testimony of appellants and appellees alike. The chancellor did not err in barring any testimony from them personally as to transactions with or statements by or to their deceased brother.

Hearsay Evidence

Appellants complain that the chancellor erred in admitting hearsay evidence to prove that the intention of the decedent was that upon his death all of his monies in financial institutions were to be collected and divided equally among his brothers and sister. The challenged testimony was that of three witnesses, who claimed to have held private conversations with Charles subsequent to the time he added Anthony's name to the bank accounts.²

The gist of each of the conversations was that Charles had selected his youngest brother, Anthony, to handle business affairs in the event that Charles became ill, and upon Charles's death, to pay his last debts and then divide any remaining funds equally among the siblings.

Undoubtedly, that evidence was offered to prove the truth of an out of court statement. Therefore, the issue before us is not whether the contested testimony was hearsay but whether it is admissible as an exception to the Hearsay Rule.

The Court of Appeals in *Mason v. Poulson*, 40 Md. 355 (1874), held that statements made by a decedent as to his

2. The three witnesses were the husband, son, and daughter-in-law of Barbara Mandish, the sister of Charles. Accordingly, their testimony is *not* inadmissible under the Maryland Dead Man's Statute. Md. Cts. & Jud. Proc. Code Ann. § 9-116. As Judge Lowe pointed out for this Court in *Trupp v. Wolff*, 24 Md. App. 588, 602, 335 A.2d 171 (1975), "[t]he persons excluded from testifying [by the Dead Man's Statute] are not those with an interest of any sort, but rather traditional real parties in interest and their representatives."

testamentary interest were admissible if offered through those persons who heard them. Courts in other States have generally arrived at the same conclusion as the *Mason* Court. For example, in *Griffin v. Robertson*, 592 S.W.2d 31, 33 (Tex.Civ.App. 1979), Chief Justice William Cornelius of the Court of Civil Appeals of Texas, said:

"Although there is some difference of opinion, the majority rule in the United States . . . is that parol evidence is admissible to show the true intention of a depositor in setting up a joint survivorship account, even though such evidence contradicts the express terms of the joint account agreement."

California follows the same rule. Justice Traynor penned for the court in *Whitlow v. Durst*, 20 Cal. 2d, 523, 127 P.2d 530-531 (1942):

"When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving.

....
Likewise, in gift cases declarations made by the grantor before, contemporaneously, and subsequent to the alleged gift are admissible though the statements be self-serving."

A person's state of mind, feelings or emotions can only be manifested to others by words, oral or written, gestures, countenance, attitude and mannerisms. While the person is alive, his own memory of what his state of mind was at a particular time is more likely to be true than that of a bystander. Yet, when the person has died, there can be no other way of proving his or her intent except by testimony of others as to the decedent's state of mind as evidenced by words, gestures, mannerisms and the like. *Mutual Life*

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Insurance Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892). Numerous other authorities adopt the same position.³

We think that the testimony of the three witnesses as to the content of Charles's conversations with them relative to his intent to have Anthony marshal the assets of the estate, pay the outstanding final debts, and then divide the net proceeds equally among the four siblings was admissible under the state of mind, or true intention exception to the Hearsay Rule. Thus, we hold that the chancellor did not err in permitting such testimony.

3. Testimony of non-party as to declaration of decedent may be admissible under certain circumstances to prove state of mind at a given time, although uttered before or after that time. See, *Watenaugh v. State Teacher's Retirement System*, 51 Cal.2d 675, 336 P.2d 165 (1959) (and cases cited therein); *Johnson v. Mueller*, 346 Ill. App. 199, 104 N.E.2d 651 (1952) (surrounding facts and circumstances, and declarations of the depositor are admitted to determine existence of donative intent); *Burns v. Paquin*, 345 Mass. 329, 187 N.E.2d 139 (1963) (oral evidence permissible to prove joint bank account deposit was created only as a matter of convenience); *Alger v. North End Savings Bank*, 146 Mass. 418, 15 N.E. 916 (1888) (statements made by depositor after creation of account to the effect that a trust was intended are admissible and may be influential); *Burns v. Plaza Bank*, 141 S.W.2d 209 (Mo. App. 1940) (no error in permitting testimony of third persons as to conversations with deceased as to her purpose in opening a joint account); *Re Hickmott*, 166 Misc. 536, 4 N.Y.S.2d 457 (1938), *aff'd* 256 App.Div. 1047, 10 N.Y.S.2d 918 (evidence as to conversation with the deceased depositor was admitted); *Havens v. Havens*, 126 Misc. 155, 213 N.Y.S. 230 (1925), *aff'd without opinion* 215 App. Div. 756, 213 N.Y.S. 818 (intention of deceased depositor was evidenced by declarations made by her while on a trip); *Re Meehan*, 59 App. Div. 156, 69 N.Y.S. 9 (1901) (evidence of depositor's declaration showed the depositor's intent); *Mabie v. Bailey*, 95 N.Y. 206 (1884) (statements of depositor made after creation of account admissible to show intent); *Green v. Conner*, 193 Okla. 133, 141 P.2d 258 (1943) (court weighed testimony of two witnesses as to statements made by depositor during her lifetime); *Glessner v. Security-Peoples Trust Co.*, 156 Pa.Super. 56, 39 A.2d 165 (1944) (testimony which throws light upon intention of the parties is admissible as regards a deposit agreement creating a joint tenancy with right of survivorship); 6 Wigmore, *Evidence*, § 1725 (Chadbourn rev. 1976).

There is authority, however, denying the right to admit parol evidence to determine the ownership of a joint deposit. See cases to that effect at 33 A.I.R.2d 569, 578-581.

The Trust Accounts

The trial judge found as a fact that the "intention of the decedent was that the monies in the financial institutions were to be collected after his death and divided in kind between his surviving brothers and sister." Having so found, the chancellor went on to hold that under *Milholland v. Whalen, supra*, the "trust accounts" vested in Anthony and were not subject to the impression of a constructive trust thereon. We have a different view.

The "special" checking account at the Union Trust Company and the savings account at the Savings Bank of Baltimore contained the legend:

"Charles F. Ebert in trust for self and Anthony F. Ebert joint owners, subject to the order of either, the balance at death of either to belong to the survivor."

Milholland v. Whalen, supra, declared as a general rule that ownership of bank accounts containing the above quoted language creates a rebuttable presumption that a trust has been impressed upon the funds on deposit to the credit of that account. "The entry, unexplained, is a sufficient declaration of trust, because it indicates an intention to establish a trust, *but this may be rebutted*." 89 Md. at 216. (Emphasis supplied.)

For purposes of the case now before us, the significant language of *Milholland* are the words "but this may be rebutted." Those words were given more meaning in *Shirk v. Suburban Trust Co.*, 248 Md. 114, 119, 235 A.2d 549 (1967), where the Court reiterated what it had said in *Shook v. Shook*, 213 Md. 603, 607, 132 A.2d 460, 462 (1957), namely:

"[T]he entry may be explained and the intention indicated may be rebutted. It is always open to the executor or administrator [of the estate] of the decedent or the parties in interest to show that the purpose of the declaration of trust was not what it, in form, appeared to be. The rebuttable presump-

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tion is that created by the execution of the transfer, and the burden of proof is on those seeking to rebut such presumption.'"

Judge Horney, writing for the Court in *Shirk*, went on to explain that under certain facts and circumstances, the "entry on the bank book" may constitute a "special trust" which terminates upon the death of the original owner of the bank account.

The entry in the savings account at the Savings Bank of Baltimore, and in the "special" checking account at the Union Trust Company were, we think, intended to create "special trusts" to pay Charles's expenses in the event Charles became incapacitated. The evidence demonstrates that upon Charles's death, Anthony's task was to collect the assets of the estate, pay the bills of the decedent and distribute equally among his brothers and sister the balance of Charles's estate. If credence is given to that testimony, it becomes apparent that a "special trust" was created and that it terminated upon the death of Charles. The accounts are, therefore, governed by the exception set out in *Milholland v. Whalen, supra*, and explicated by *Shook*.⁴ They did not pass by operation of law to Anthony. The trial judge erred in his application of *Milholland*, especially after he found that Charles' intent was to the contrary. Accordingly, we shall reverse that part of the decree.

The Non-Trust Account

It is clear that of the three remaining accounts, at least two of them, a passbook savings and a certificate of deposit, both at Security Savings and Loan Association, are "jointly held." Appellants maintain that the third account, a "Multiple Maturity Time Deposit Account" (MMTDA) with Union Trust Company, was a "trust account" within the meaning of *Milholland v. Whalen, supra*. The chancellor apparently took the position that the MMTDA account was

4. See also, *Hancock v. Savings Bank of Baltimore*, 199 Md. 163, 85 A.2d 770 (1952); *Bolluck v. Bollack*, 169 Md. 407, 182 A. 317 (1935).

not a "trust account." Irrespective of how it is viewed, the ultimate outcome will remain unaffected. If the MMTDA is seen as a "trust account," its disposition is governed by "the Trust Account" section of this opinion. If it is not a "trust account," it is properly included in this section.

Anthony claims that he is entitled to the funds in the two Security Savings and Loan accounts inasmuch as he and decedent were joint tenants with the inherent right of survivorship of the funds in those accounts. To buttress his stand, Anthony points to an agreement that he and Charles signed as part of the paper work involved in opening the accounts. The agreement provides, *inter alia*, that "it shall be conclusively presumed that it was the intention of said parties to create a joint tenancy"

There are, we think, two answers to appellants' contention. The first is found in *Whalen v. Milholland*, 89 Md. 199, 43 A. 45 (1899). There it is said:

"Where . . . it appears that the original owner purposely deposited the fund to his and another's credit as joint owners, retaining the pass-book so as to continue his dominion over the money; a distinct, unequivocal delivery of the book to the other person named as co-owner, with the intention to part with the ownership and to make an irrevocable gift of the fund and an acceptance of it by the donee, would pass the whole interest therein to the donee, because there would then be no inconsistency between the legal effect of the entry on the book, and the right in which the donee of the book could claim the deposit, and there would no longer be a *locus penitentiae* in the original owner." 89 Md. at 206.

The evidence in the instant case is that the passbook and certificate were in Charles's possession until his death. A few days afterwards, Anthony removed them from decedent's home. Consequently, there was no *inter vivos* delivery of the alleged gift during Charles's lifetime. The chancellor properly held that there was no completed gift, and the

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money passes to Charles's estate. The heirs, as brothers and sister of the decedent, inherit equally.

The second answer is that ownership of the funds did pass to Anthony under the survivorship language of the accounts, but that a constructive trust for the benefit of all four of Charles's siblings is impressed upon the funds in Anthony's hands.

In *Potts v. Emerick*, 293 Md. 495, 445 A.2d 695 (1982), Mrs. Timbrook placed the name of her married sister, Mrs. Potts, on several bank accounts. They assumed the accounts to have been in a form sufficient to pass sole ownership of the funds to Potts on Timbrook's death. Subsequently, in an unattested paper writing, and then later on by a Last Will and Testament, Mrs. Timbrook made clear her intent to have her sister use the funds in the joint bank accounts to pay various expenses and to fund the monetary and residuary bequests set forth in the Timbrook Will. Potts agreed to do so. After Timbrook's death, Potts refused to fund the bequests fully, maintaining that the monies in the joint accounts passed by survivorship to her absolutely in accordance with both the terms of the account and Timbrook's intent at the time the accounts were created. Potts asserted that any attempt to impose a further trust on her beneficial interests failed because Timbrook's power to alter their arrangement was limited to *inter vivos* withdrawal of the funds which did not occur. Neither the circuit court nor the Court of Appeals shared Potts's point of view.

The Court of Appeals determined that where the settlor's intention was that funds in the joint accounts be used in a particular way, the act of the beneficiary in revoking the promise after the death of the settlor warranted imposition of a constructive trust on the funds in the hands of the beneficiary for the benefit of the settlor's estate on the theory of unjust enrichment. 293 Md. at 501.

Anthony avers that the distinction between *Potts v. Emerick* and the case at hand is that in *Potts* there was testimony that Potts assented to the decedent's expression of intent, but in the case at bar, there was no evidence that

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Anthony assented to Charles's wish. We do not perceive that distinction.

We believe the chancellor thought that Anthony knew of Charles's intent as that intent was recounted by witnesses. Thus, the trial judge may well have inferred that Anthony did "assent" to Charles's wish that he, Anthony, act as the representative of Charles, gather the assets and disburse them in accordance with Charles's intent, the form of the accounts notwithstanding.

Decree affirmed in part and reversed in part.

Case remanded for the entry of a decree in accordance with this opinion.

Costs to be paid by appellants.

MANDATE
Court of Special Appeals of Maryland

No. 1073, September Term, 1982

Anthony Francis Ebert et ux

v.

Judith P. Ritchey, Personal
Representative of the Estate of
Charles F. Ebert et al

April 14, 1983 - Opinion by Gilbert, C.J. Decree
affirmed in part and reversed in part. Case remanded
for the entry of a decree in accordance with this
opinion. Costs to be paid by appellants.

April 20, 1983 - Motion to Accelerate Issuance of
Mandate Request for Emergency Ruling filed by
counsel for appellee, cross-appellants.

April 20, 1983 - Motion granted.

April 20, 1983 - Mandate issued.

ANTHONY FRANCIS * In the
EBERT et ux * Court of Appeals
v. * of Maryland
JUDITH P. RITCHHEY, * Petition Docket No. 137
Per. Rep. of the * September Term, 1983
Estate of Charles * (No. 1073, September Term,
F. Ebert et al. * 1983, Court of
* Special Appeals)

* * * * *

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: August 9th, 1983.

ANTHONY FRANCIS * IN THE
EBERT et ux. * COURT OF APPEALS
* OF MARYLAND
v. * Petition Docket No. 137
* September Term, 1983
JUDITH P. RITCHHEY, * (No. 1073 - September
Pers. Rep. of the Term, 1982 Court of
Estate of Charles F. Special Appeals)
Ebert et al. *

* * * * *

O R D E R

Upon consideration of the Motion for Reconsideration filed in the above entitled case, it is this 31st day of October, 1983,

ORDERED, by the Court of Appeals of Maryland, that the Motion be, and it is hereby, denied.

/s/ Robert C. Murphy
Chief Judge

SUPREME COURT OF THE UNITED STATES

No. A-612

ANTHONY FRANCIS EBERT, ET UX.,

Petitioner,

v.

JUDITH P. RITCHIEY, ETC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of
counsel for petitioner,

IT IS ORDERED that the time for filing a
petition for writ of certiorari in the above-entitled
cause be, and the same is hereby, extended to and
including March 29, 1984.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 1st day of
February, 1984

ALEXANDER L. STEVENS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ANTHONY FRANCIS EBERT, ET UX.,

Petitioners,

v.

JUDITH P. RITCHIEY, ETC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OBJECTION TO JURISDICTION

Petitioners have blatantly disregarded the provisions of Rule 21.1(h) of this court, in their Petition for Certiorari, by failing to specifically delineate precise references to the record showing that a federal question was timely and properly raised and decided by the Maryland Courts. Undoubtedly, the reason for this omission is because Petitioners did not raise any federal, constitutional issues in the trial court (Circuit Court for Baltimore County), the intermediate appellate court of Maryland (Court of Special Appeals), or in Maryland's highest court (Court of Appeals).

Petitioners' own exhibits and references to the record demonstrate clearly that no federal, constitutional question or issue was either raised or decided in any of the three Maryland Courts which considered this case.

In the trial court, Petitioners acquiesed to the ruling of the trial judge, on the

issue of the propriety of the Maryland Dead Man's Rule, agreeing it would "apply" to certain testimony of the petitioner, Anthony F. Ebert (See Petition for Writ of Certiorari, pp 3-4). Furthermore, after the trial judge sustained objection to the question, Petitioners did not present any federal, constitutional issue to the trial judge or in any other manner raise or preserve such an issue. The opinion of the trial court (Petitioner's Appendix, pp 1-7) makes no mention of any federal, constitutional issue raised or decided at the trial of the case.

Petitioners' appeal to the Maryland Court of Special Appeals raised five issues (see Petitioners' Appendix, p. 10) - none of which presented a federal, constitutional question.

When Petitioners finally constructed their novel theory, that the Maryland Dead Man's Rule is "unconstitutional", they still did not make any mention of any federal, con-

stitutional provision which would render the Maryland statute infirm. Although Petitioners asserted a "constitutional" theory before the Maryland Court of Appeals, it was unclear whether the reference was to the Federal Constitution or the due process provision of the Maryland Constitution (Declaration of Rights- Article 24). Such defects in the record preclude the exercise of jurisdiction by this Court. In the case of Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981), Justice White stated for the court:

For all of these reasons, we, as well as litigants seeking to bring cases here from the state courts, should take care to comply with the jurisdictional statute and our rules. Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the federal constitution or the federal statute on which they rely, we have not insisted on such inflexible specificity. The inevitable result is that at times there have been differences of opinion as to whether the state courts have been afforded a fair opportunity to address the federal question that is sought to be presented here.

At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

* * *

Because petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court failed to rule on a federal issue, we conclude that we are without jurisdiction in this case. Accordingly, the writ is dismissed for want of jurisdiction. (emphasis added)

Respondents submit that the jurisdictional principles articulated by this Court in Webb v. Webb, supra, are controlling in this case. That is, where the record does not clearly reflect that a federal question has been raised and decided in the state court below, the appellate jurisdiction of the Supreme Court fails. Accord, Illinois v. Gates, U.S. , 103 S.Ct. 2317 (1983); Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct.

1163 (1969); Tacon v. Arizona, 410 U.S. 351, 93 S.Ct. 998 (1973); City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 672, 96 S.Ct. 2358 (1976).

In addition to noncompliance with federal law, as set forth above, there is an independent state procedural ground barring consideration of the constitutional issues raised by petitioners. Under Maryland law, the failure to present a point or question to the trial court precludes consideration by the Maryland Court of Special Appeals, Maryland Rules of Procedure, Rule 1085, or by the Maryland Court of Appeals, Maryland Rules of Procedure, Rule 885. The Maryland appellate courts have stated that the requirements of these two rules are matters of "basic fairness to the trial court, and to opposing counsel, as well as being fundamental to the proper administration of justice." Medley v. State, 52 Md. App. 224, 448 A.2d 363 (1982). Furthermore, both of these

rules have been construed to prevent a belated attack in the appellate courts on the constitutionality of a Maryland statute.

Woodell v. State, 2 Md. App. 433, 234 A.2d 890 (1967); Smith v. State, 16 Md. App. 317, 295 A.2d 802 (1972); Hall v. State, 22 Md. App. 240, 323 A.2d 435 (1974).

The record in this case shows that Maryland's highest court refused to consider Petitioners' "constitutional" issues. This court has frequently stated that when the "highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary" Webb v. Webb, supra; Michigan v. Tyler, 436 U.S. 513, 98 S. Ct. 1942 (1978); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354 (1969).

Respondents submit that it is totally unfair for Petitioners to raise federal,

constitutional questions some two and one-half years after the trial of this case. The issues presented to this court appear to be an "after-thought" of Petitioners' counsel.

STATEMENT OF THE CASE

Although Petitioners' version of the facts is reasonably accurate, Respondents would point out that a more precise statement is articulated in the opinion of the Maryland Court of Special Appeals (Petitioners Appendix pp 8-10). This court is also asked to note that the trial judge carefully conducted a three day trial, heard from six witnesses (including Petitioner, Anthony F. Ebert) and received thirty-two separate exhibits into evidence. The testimony from the disinterested witness showed that the intent of the decedent, Charles F. Ebert, was for his assets to be divided equally among his heirs. Furthermore, the record in this case is replete with admissions against

interest made by Petitioner, Anthony F. Ebert, which are more than sufficient to prove the decedent's intent to divide his assets equally among his surviving brothers and sister and the Petitioner's awareness of his obligation to do so.

ARGUMENT

Apart from the jurisdictional objections set forth above, Respondents wish to alert the court to several additional reasons why a grant of certiorari would be inappropriate in this case.

Petitioners loudly complain that the Maryland Dead Man's Rule prevented their testimony before the trial court regarding certain bank accounts. Respondents submit that the record shows not only that petitioners failed to properly preserve appellate review on this point, regarding the testimony of Anthony F. Ebert, but also that co-petitioner, Adeline Ebert, never took the witness stand and was never asked a single question!

Respondents contend that it is an inexcusable attempt to mislead this court to state that "Petitioners were unable to testify" (Petition for Certiorari, p. 12) when only one of the Petitioners was offered as a witness at trial.

Maryland law is clear that where an objection to testimony is sustained, and evidence is excluded, by the trial court, such ruling may be preserved for appellate review only by stating to the trial court a detailed summary of what the testimony would have been had the witness been permitted to answer the question. Hughes v. Averza, 223 Md. 12, 161 A.2d 671 (1960); Hooton v. Kenneth B. Mumaw Plumbing and Heating Co., 271 Md. 565, 318 A.2d 514 (1974). In the absence of a proffer in the trial court, as to what the evidence would be, there is "nothing to review on appeal". Kennedy v. State, 289 Md. 54, 421 A.2d 1376 (1980). See also Chevrolet Motor Co. v. Gladding, 42 F2d 440 (1930,

CA4), cert. denied 282 U.S. 872, 51 S.Ct. 78.

In this case, the record is devoid of any proffer as to what the testimony of Anthony F. Ebert would have been, had the trial court allowed the Petitioner to answer the question objected to (See Petition for Certiorari, p. 3). Accordingly, this court would be required to speculate and conjecture on what the Petitioner's answer would have been and such procedure would certainly be a precarious practice.

Even if the court elected to engage in speculation, as to Petitioner's answer, it is submitted that even a favorable response would be merely cumulative of other evidence submitted by Petitioners at trial (e.g. paper writing of decedent, Petition for Certiorari, p. 9) [Petitioners persist in characterizing this document as a "will" despite the trial judge's ruling that it was not a will and was not reflective of decedent's true intentions at his death - see Petition-

er's Appendix A-5].

Respondents also submit that Petitioners' arguments on the issues submitted to this court are without any citation of authority which would support their reasoning or conclusions. Respondents' counsel could not locate even one case or precedent which would support Petitioners' assertion that a reasonable restriction on the receipt of evidence against decedent's estates is "unconstitutional". In this regard, the court is asked to note that all of the Respondents in this case were precluded from testifying, under the Maryland Dead Man's Rule, in the same manner as were Petitioners. See Reddy v. Mody, 39 Md. App. 675, 338 A.2d 555, cert. denied, 238 Md. 736 (1978). Under Maryland law, claims against, or in favor of, decedent's estates must come from disinterested witnesses.

In all candor with the court, Respondents believe that the petition filed in this

case is so utterly without merit as to warrant an award of damages in favor of the Respondents. Not only was there a complete failure to properly preserve any federal, constitutional question in the state courts, Petitioners' counsel has continued his practice of failing to adequately research the applicable law necessary to sustain jurisdiction on appeal. Such neglect on the part of Petitioners' counsel creates an incredible amount of work and expense for this Court, to counsel and to the Respondents who are persons of modest means. Furthermore, the Petitioners have been greedy and uncompromising in their refusal to turn over the decedent's funds to decedent's personal representative, notwithstanding the clear mandate of the Maryland Courts to do so. The court is respectfully urged to consider Respondents' Motion for Damages, filed contemporaneously with this Brief, and thereafter to assess a realistic award of damages against

the Petitioners in this case.

CONCLUSION

Petitioners have failed to properly preserve appellate review in this Court by not raising any federal, constitutional issue in the state courts. Even without this defect in the record, this Court would be required to speculate on Petitioners' contentions because no proffer of evidence was made to the trial judge. In all events, the decisions of the state courts below followed a long line of Maryland precedents, were based on substantial evidence and reached a fair and just result. Accordingly, no further review of this case is warranted.

Respectfully submitted,

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APPENDIX

Maryland Rules of Procedure-Rule 1085

Scope of Review--Limited to Questions Decided by Lower Court.

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.

Maryland Rules of Procedure-Rule 885

Scope of Review--Limited to Questions Decided by Circuit Court.

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the circuit court; but when a point or question of law had been presented to the court and a decision of that point or question of law by this Court is necessary or desirable for the guidance of the circuit court, or to avoid the expense and delay of another appeal to this Court, the point or question of law may be decided by this Court even though it was not decided by the circuit court. When jurisdiction cannot be confer-

red on this Court by waiver or consent of the parties, a question as to the jurisdiction of the circuit court may be raised and decided in this Court, whether or not raised and decided in the circuit court.

Constitution Of Maryland

Declaration of Rights--Article 24. Due Process.

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.